

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000180-MR

DARRELL ANDERSON

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 06-CR-00058

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

WINE, JUDGE: Darrell Anderson, *pro se*, appeals from a denial of his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr)

11.42. Anderson argues that (1) counsel failed to object and request a mistrial when he stood trial in prison clothes; (2) counsel failed to investigate the bias of

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the prosecution's material eyewitness during cross-examination; and (3) counsel failed to object to the prosecution's improper comments allegedly made during closing arguments. Having considered those arguments and the applicable case law, we affirm the trial court.

Facts

On the evening of March 1, 2003, Anderson attended an auction at the Old Jeffrey Store located in Monroe County, Kentucky. Around 8:00 p.m., Officer Darryl Ford took Anderson into custody after police responded to a complaint that Anderson was intoxicated and disruptive at the event. On the drive to the police station, Anderson asserted he would go back to the Old Jeffrey Store, "to see why they had him arrested." Anderson was detained at the police station for four hours and then released. At approximately 7:00 a.m. the next morning, March 2, 2003, the Old Jeffrey Store burned to the ground. Investigators determined the fire had been intentionally started by use of an accelerant.

On June 21, 2006, the Monroe County Grand Jury indicted Anderson on a charge of second-degree arson. KRS 513.030.

At trial, Everett Key testified he heard a loud vehicle outside near the Old Jeffrey Store in the early morning hours of March 2, 2003. Key looked out his window and saw Anderson, with whom he was acquainted, pour the contents of a two-gallon gas can onto the porch of the store then ignite the fire. He then observed Anderson depart the scene in a vehicle.

On November 8, 2007, a Monroe County jury found Anderson guilty of second-degree arson and recommended a sentence of ten years. Anderson's post-trial motion for judgment of not guilty notwithstanding the verdict or, in the alternative, motion for a new trial, was denied.

On December 19, 2007, a final judgment was entered against Anderson sentencing him to ten years of imprisonment, consistent with the jury's recommendation. The trial court ordered this ten-year sentence to run consecutively with a previously imposed twenty-year sentence from Barren Circuit Court. Anderson filed a timely appeal from that judgment of conviction, raising only two grounds. Subsequently, on January 24, 2009, this Court unanimously affirmed the trial court.² On November 24, 2009, Anderson filed a motion pursuant to RCr 11.42 alleging ineffective assistance of counsel and a motion requesting an evidentiary hearing. The trial court entered an order on December 29, 2009, denying Anderson's 11.42 motion without an evidentiary hearing. The order contained findings of fact delineating points in the record refuting Anderson's allegations of ineffective assistance of counsel. It is from this order that Anderson now appeals.

The trial court denied the request for an evidentiary hearing as it found Anderson's allegations were refuted on the face of the record. RCr 11.42(5) provides that, if a motion "raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing." Thus, a defendant

² *Anderson v. Commonwealth*, 2009 WL 50493 (Ky. App. 2009) (2008-CA-000268-MR).

is not automatically entitled to an evidentiary hearing. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). Rather, a hearing is required only if there are material issues that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993). *See also, Brewster v. Commonwealth*, 723 S.W.2d 863, 865 (Ky. App. 1986) (“[T]he trial court obviously may and should consider the totality of the evidence presented to the trier of fact. If this may be accomplished from a review of the record the defendant is not entitled to an evidentiary hearing.”)

Further, with regard to the standard of review of an RCr 11.42 motion, “[s]uch a motion is limited to issues that were not and could not be raised on direct appeal.” *Sanborn v. Commonwealth*, 975 S.W.2d 905, 908-09 (Ky. 1998), *overruled on other grounds by Leonard v. Commonwealth*, 729 S.W.3d 151 (Ky. 2009).

The proper standard of review upon a claim of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). The two-prong test in *Strickland* requires a showing that counsel’s performance as deficient as it fell outside the range of professional competent assistance, and that such deficiency was prejudicial as there exists a reasonable probability that the outcome would have been different but for counsel’s deficient performance. *Id.*

In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland* at 688-89. Due to the difficulties in making a fair assessment of a trial counsel's performance, "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland* at 669. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (noting the court must examine counsel's conduct in light of professional norms based on a standard of reasonableness.).

Even when trial counsel's performance falls below the minimum standards of conduct, relief is not available unless such conduct resulted in actual prejudice to the defendant. Actual prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693.

Anderson first argues that he was denied effective assistance of counsel when his trial counsel failed to object and request a mistrial when Anderson was compelled to stand trial in prison clothes. Anderson asserts there are locations in the trial record where he can be seen wearing prison clothes.³

³ Those times were 1:34, 1:45, 1:56, and 2:16. It appears from the video log that the first time would have been during the examination of the Commonwealth's last witness, the second time

Regrettably, Anderson failed to designate the trial video as part of the record for this appeal. “It is the appellant’s duty to present a complete record on appeal.” *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). This duty applies to *pro se* litigants. *Graves v. Commonwealth*, 283 S.W.3d 252 (Ky. App. 2009). When the record is incomplete, we assume the omitted record supports the trial court’s decision. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Had the bailiff’s affidavit been more specific as to the timing of when the jury saw Anderson in prison attire, there may have been a factual issue not resolved upon review of the record. The jury may have seen him during the penalty phase when his prior criminal record was entered into evidence. We fail to see where Anderson would have been prejudiced.

The trial court summarily refutes this assertion, noting that “[t]he entire record clearly discloses at no time did the members of the jury view Anderson wearing any prison clothing.” Likewise, the Commonwealth argues that the video record of the trial proceeding only depicts that Anderson wore a dark-colored jacket, and at no time did any member of the jury view him wearing discernible prison clothing.⁴ The Commonwealth cites to a portion of the record which arguably could be the first morning of the trial. Herbert Proffitt, the bailiff assigned to the courtroom, averred in an August 4, 2009 affidavit that he provided his sheriff’s jacket to Anderson to hide the prison marking on Anderson’s khaki

while motions for directed verdict were made, and the last two during the defense’s case.

⁴ Interestingly, on June 8, 2007, the court was forced to declare a mistrial when Anderson appeared before the jury in shackles and a prison uniform.

shirt. However, Proffitt swore the jury saw the prison uniform worn by Anderson before it was covered. The affidavit does not indicate whether this occurred during the guilt phase or penalty phase of the trial. Neither the trial court in its findings of fact, nor the Commonwealth in its brief before this Court addressed this affidavit.

However, this issue could have been raised on direct appeal. RCr 11.42 is limited to issues that were not and could not be raised on direct appeal. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001). The trial court properly rejected Anderson's argument of ineffective assistance to counsel for failure to object to Anderson's clothing.⁵

Anderson next argues that he was denied effective assistance of counsel when his counsel failed to investigate the bias of the prosecution's eyewitness, Key, on cross-examination. Key, who lived across the street from the store, testified that he saw Anderson set fire to the store. Anderson alleges Key may have been biased because it was rumored in the community that Anderson was involved in the vehicular accident that took the life of Key's son.

Additionally, Key is related by marriage to the owner of the Old Jeffrey Store.

A convicted defendant claiming ineffective assistance of counsel has the burden of: 1) identifying specific errors by counsel; 2) demonstrating that the errors by counsel were objectively unreasonable under the circumstances existing at the time of trial; 3) rebutting the presumption that the actions of counsel were the result of trial

⁵ Anderson suggests that the failure to raise this issue on direct appeal should be subject to a palpable error review pursuant to RCr 10.26. While ineffective assistance of appellate counsel may be pursued, we do not find it has been appropriately raised at this time. *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010).

strategy; and 4) demonstrating that the errors of counsel prejudiced his right to a fair trial.

Simmons v. Commonwealth, 191 S.W.3d 557, 561-62 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Anderson's trial counsel cross-examined Key, asking questions designed to challenge Key's ability to view the scene. Counsel was able to elicit testimony that the person who set the fire had his back to Key part of the time Key looked through the window. Counsel did not question Key about potential predispositions toward Anderson. Anderson has not brought forth facts or shown that the failure to cross-examine Key's biases is attributable to a lack of diligence rather than an exercise in judgment. It is reasonable that counsel believed inquiry into Anderson's possible participation in a vehicular homicide could have been more prejudicial than probative. Thus, Anderson has failed to rebut the presumption that his counsel's actions were the result of sound trial strategy. As an appellate court, we "must be especially careful not to second-guess or condemn in hindsight the decision of defense counsel." *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998). The fact that the ultimate outcome of the trial was against Anderson does not render counsel constitutionally ineffective.

Finally, Anderson argues that his counsel's representation was deficient in that he failed to object to the prosecution's improper comments concerning the credibility of Key. Anderson alleges the prosecutor's statements regarding Key's credibility, such as "I submit to you he was 100% certain", and "[h]e didn't lie,"

were improper and, as such, his counsel should have objected. The trial court found that “[t]he record clearly shows that the prosecutor did not state his personal belief regarding the probity of witnesses, but instead commented on the demeanor and steadfastness of certain witnesses.” Pursuant to the *Strickland* standard, Anderson must show not only that his counsel’s performance was deficient, but also that the outcome of the trial would have been different had it not been. As the evidence in this case was severely against Anderson, it is more likely there would have been no change in the outcome of the trial had Anderson’s counsel objected to the prosecutor’s closing statements.

Additionally, this issue could have been raised on direct appeal. *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002). RCr 11.42 is limited to issues that were not and could not have been raised on direct appeal. *Haight, supra*.

Conclusion

The trial court did not err when denying Anderson’s motion without an evidentiary hearing as the record conclusively resolves his claims. Anderson has not proven as a matter of law “that the performance of the trial counsel was deficient and, then, that that deficiency resulted in actual prejudice so as to deprive the appellant of a fair trial.” *Brewster*, 723 S.W.2d at 864. Wherefore, we affirm the trial court.

ALL CONCUR.

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